United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1393

To be argued by
ARMENDE LESSER

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOE TRUMAN BOYD et al.,
M.S. KNISELY,

Defendants-Appellants.

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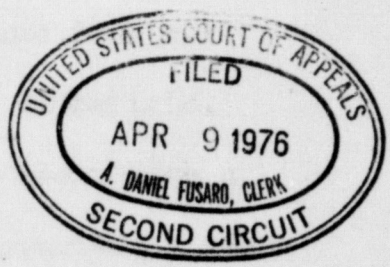
REPLY BRIEF FOR DEFENDANT-
APPELLANT M.S. KNISELY



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REPLY BRIEF FOR DEFENDANT-APPELLANT M.S. KNISELY

I

Indictment 75 Cr. 140 together with indictment 75 Cr. 346 charged seventeen individuals and four co-conspirators with an assortment of S.E.C. violations. The Government then supplemented the indictment with a list of thirty-three co-conspirators not previously identified in the indictment together with seven corporations involved with "some prior; contemporaneous and subsequent similar acts not previously identified, which may become the subject of proof in both the Government's direct and rebuttal cases."

There is little wonder, therefore, that throughout this lengthy trial, involving alleged violations in New York, Nevada and Texas, involving conspiracies within the umbrella of the overall charge would result in a spill-over effect: the transference of guilt from members of one conspiracy to members of another (United States v. Miley, 513 F. 2d 1191, 1206 [2d Cir. 1975]; Kotteakos v. United States, 328 U.S. 750 [1946] ; United States v. Bertolotti et al., 2d Cir. decided November 10, 1975).

In United States v. Bertolotti, this court held (Van Graafeiland, C. J.) on page 6421:

> "It may generally be conceded that the possibility of prejudice resulting from a variance increases with the number of defendants tried and the number of conspiracies proven. Blumenthal v. United States, 332 U.S. 539, 559 (1947); United States v. Miley, supra, at 1209; Note, supra, 57 Colum. L. Rev. at 402. 'Numbers are vitally important in trial, especially in criminal matters.' United States v. Kotteakos, supra, at 772. Indeed, the major distinguishing factor between the Supreme Court's finding of no prejudice in Berger and its contrary conclusion in Kotteakos was the difference in the number of defendants and conspiracies. While we recognize that the question of prejudice is not solely quantitative, a consideration of the 'numbers' involved in the case seems an appropriate starting point for our analysis."

It is, therefore, understandable how the jury in the instant case found Knisely culpable despite the

fact that the record does not contain a single word of conversational testimony. That he signed contracts and other documents as president and attended a meeting or two is not sufficient to sustain conviction of conspiracy.

The remaining witnesses that had occasion to mention Knisely's name clearly and succinctly remember that Knisely did not participate in any policy discussion pertaining to Select Enterprises or with respect to the various acquisitions by Select. He truly personified the description given by the prosecutor describing Knisely as the "friend" that assumed the presidency to accomodate his friend, Boyd, and that throughout the entire life of Select he was a "tool" of Boyd. Nor does the Government fill the void in this record with respect to: proof of knowledge; proof of wilfullness; proof of an "affirmative attempt" to further the purposes of the conspiracy (United States v. Johnson, 513 F. 2d 819, 823 [1974]).*

The Government contends that Knisely's presence, as "a front man," his signature as president on documents and releases concededly prepared by others clearly overcomes the requirements of this circuit that to convict, mere presence, without proof of wilfullness; without proof

*and authority fully set forth in appellant's main brief, pp. 12-16

of knowledge; without proof of doing something in furtherance of this venture is enough (United States v. Cirillo, 499 F. 2d 872, 873; 2d Cir. 1974).

The Government's case against Knisely rests solely on this weak foundation and to give it some badly needed support relies on inference and innuendo. Ths scenario commences with the "fraudulent January 27 balance sheet...and a fraudulent report of even date signed by Knisely as Select's president (one of many fraudulent documents Knisely signed as a front man)"(p. 4)[1] There is no specific charge that Knisely concocted the fraud, knew of the fraud or otherwise participated in the fraud.

Knisely's alleged participation is spelled out as:

> "Boyd told Joiner that he had 'good people he had known for a long time' who would 'represent' Select.--Knisely as President--Boyd was going to get signature samples from Knisely--so they could be 'placed on the stock' and stock could be printed'" (p. 9)

That 'the several Knisely signatures in the minutes and other papers...appears[2] to be genuine--." (p. 10)

To obtain certified financial statements, Boyd retained Bill G. Elms, an accountant, and obtained from him

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[1]reference to Government's brief

[2]emphasis supplied

a letter to the effect that he (Elms) was engaged to do accounting work, without defining the scope, which letter "was attached by the conspirators to a January 27 letter from Knisely to Select's Board of Directors and Select's January 27 Balance Sheet both of which were false." (p. 13)

The Government then traces the delivery of these documents by Boyd to Segal and the subsequent use in creating a market for Select stock. (p. 15) No specific charge is leveled against Knisely other than the initial statement that he signed a document in his representative capacity. He did not prepare the document nor did he know its contents or its purpose.

The next statement of fact by the Government involving this appellant states that "(o)n March 1 in Texas Knisely met Segal in Boyd's presence, and executed the backdated contracts for Select" (p. 25)

The record however does not support this conclusion. Spegal specifically stated that he flew to Texas to "Mr. Boyd who had Mr. Knisely sign both contracts..."

> Q. Did you have Dr. Knisely sign the contract or did you give it to Mr. Boyd?
>
> A. I gave it to Mr. Boyd.
>
> Q. Did you have any <u>contact</u> with Dr. Knisely with respect to the contents of any of these transactions?
>
> A. Not at all. (emphasis supplied)

The Government charge that Knisely "falsely told the SEC he did not know Segal" (p. 46); the same false statement attributed to Knisely under the heading "The SEC perjury" (p. 34) is founded on this isolated occurrence when Segal flew to Texas to meet Boyd. Knisely may have recognized Segal but the name meant nothing to him.

Though Knisely attended the meeting of March 26 at Ford's office (chaired by Joe Boyd (1794 Tr) he did not participate "except by his physical presence..." (Ford Tr 1993) (p. 32)

The news release signed by Knisely as Select's president was prepared by Chapel (a Government witness) at Boyd's request with information furnished by Boyd (p. 33). This witness testified before the grand jury and at this trial to the effect that Knisely played an inactive part "because I don't remember ever seeing him in the various Select offices or I don't believe I ever saw him with Joe Boyd in regard to Select Enterprises," and "I don't recall him participating at all."

II

The Government's brief, replete with novel motif, titles and subtitles, carefully and systematically weaves

its case against each of the principal actors. The Government's case commences with the early meetings between Boyd and Joiner; Boyd meets Segal; Boyd acquires Select; Select issues its first stock, and so forth; yet throughout the entire espousal of the Government's argument there is not a single heading, subheading or incident to the effect that Knisely said; Knisely did; or Knisely otherwise participated in the alleged conspiracy. As a matter of fact, the Government made absolutely no effort to answer the points raised in the appellant's main brief "that there must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it to make it succeed" (U.S. v. Cirillo, supra, p. 883).

Respondent cites the official transcript before the Securities and Exchange Commission (GX 22) to support its charge that Knisely lied during the course of the hearing, yet completely ignores the testimony given before this Governmental body which fully corroborated Knisely's contention that he was merely a figurehead or dummy in connection with the basic charge herein. No mention is made of the fact that Knisely's contribution to Boyd was the use of a room in his chiropractic office and the use of the phone, for which he still owed some $34 (GX 22, p. 51).

That Knisely traded 10,000 shares of C.A. Morris stock and other stock holdings for the Select stock that was issued in his name (GX 22, pp. 11 and 14). That Knisely's telephone was used as a medium of exchange between Boyd and others (GX 22, p. 24). That during the course of this examination he was asked:

> Q. Did you ever get any calls from Allen Segal in New York?
>
> A. No, I don't know Segal. (GX 22, p. 25 11. 4-6)

The witness explained to his examiners that he had difficulty remembering names (GX 22, p. 36, 11. 2-11), a rather normal difficulty when a person reaches the venerable age of seventy-eight years.

Nor does the Government mention the fact that Knisely testified before the Commission that his Select stock was not for sale, that he never offered it for sale, that he had nothing at all to do with the various transactions (GX 22, pp. 31-32). That though Knisely was physically present at the March Board of Directors meeting (aptly described by witness Ford that Knisely was only physically present), he left for home at 8:00 P.M. while the others remained until 8:00 o'clock in the morning to complete the various financial documents and releases.

The Government concedes (Gov't Brief, p. 33, 15) that the statements and news release were prepared by Boyd and Chapel and signed by Knisely as Select's president and not a product of Knisely, the individual "co-conspirator".

Under heading "16a, the SEC Perjury," Knisely is grouped with Boyd and others followed by the statement, "Each of these witnesses made false statements," citing exhibits which do not involve this appellant. The charge of perjury is improperly based upon Knisely's answer, "No, I don't know Segal" in response to a question, "Did you ever get any calls from Allen Segal in New York?" Unfortunately, considerable emphasis has been attached to this honest answer, both in ~~this~~ its brief and more important to the jury in the Government's summation.

III

To make up for the lack of the requisite evidence to sustain this judgment, the Government resorts to coersive persuasion by constant repetition of facts and acts of co-defendants where it could tie in Knisely's name solely as a buildup. For instance, after referring to the Knisely letter of January 27, which was attached to an accountant's letter and other papers (Gov't Brief, p. 4), the use of the exhibit with emphasis on the name

of Knisely is repeated on pages 13, 14 and 15.

Similarly, the Knisely name is constantly repeated in situations involving substantive acts by co-defendants wherein he played absolutely no part other than perhaps sign a document as president or was physically present (Gov't Brief, pp. 25, 32, 33, 34 and 35).

CONCLUSION

The Government failed to establish that this defendant directly or indirectly, circumstantially or inferentially, participated with others to accomplish an unlawful act. His guilt was not established beyond a reasonable doubt. The judgment of conviction should be reversed.

Respectfully submitted,

ARMENDE LESSER
Attorney for Defendant-
Appellant M.S. Knisely

State of New York, County of New York ss.:

Armende Lesser

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 475 Fifth Avenue, N.Y.

That on the 7th day of April 19 76

deponent served the within Reply Affirmation of Compliance on

attorney(s) for ~~Defendant~~ respondent

at Andrews Plaza, N.Y. 10007

the address designated by said attorney(s) for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within New York State.

Armende Lesser

Sworn to before me, this 7th day of April, 19 76

HYMAN L. RUTMAN
Notary Public, State of New York
No. 30-[illegible]4
Qualified in Nassau County
Commission Expires March 30, 1978